Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1996

James A. Begier, Petitioner
vs.
Patricia Begier, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Does the denial of a father's right to cross-examine witnesses and to present witnesses in his own behalf at a hearing which results in the loss of custody of his daughter violate the constitutional guarantee of due process of law?

2. Does a parent have a due process right to a statement of reasons for being stripped of legal custody of his child?

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Opinions and orders of lower courts and basis for jurisdiction.

The ruling from which relief is sought is the opinion of the California Court of Appeal, First Appellate District, Division One, issued June 12, 1996 and modified by order issued July 19, 1996, which affirmed the ruling of the Alameda County Superior Court issued July 23, 1992. The rulings were not published; they are attached hereto in chronological order as appendices 1, 2 and 3.

Petitioner's petition for rehearing in the Court of Appeal was denied in the July 19, 1996 order. Petitioner petitioned for review by the California Supreme Court; said petition was denied October 2, 1996. (Appendix 4)

Petitioner brings this petition pursuant to 28 U.S.C. §1257. The constitutional provision under which relief is sought is the Fourteenth Amendment to the United States Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deny any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the case.

In 1990 petitioner's now ex-wife filed a marital dissolution petition in the Alameda County California

Superior Court. Shortly thereafter she accused petitioner, her ex-husband, of having sexually molested their three year old daughter. As a consequence of that accusation, she obtained advantageous interim rulings regarding custody, visitation and financial support. All parental visits allowed to appellant with his daughter were ordered to be supervised by authorized personnel. In 1991, after a five day trial, the Hon. Ronald Sabraw found that wife had not met her burden of proof of the molestation accusation and awarded petitioner joint legal custody of his daughter, providing an extensive written statement of reasons for all of his rulings.

In early 1992 further evidence came to light which suggested that petitioner's ex-wife's charges were not merely unfounded, but that she had intentionally fabricated evidence to support a charge she knew was false. Petitioner herein filed a motion for financial sanctions as well as additional requests for modification of custody and support orders. His ex-wife responded ten days before the scheduled hearing with counter-motions of like variety, including a request that sole legal and physical custody of the parties' daughter be awarded to her. She did not, however, repeat her previous claim of molestation[1]. On

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1. The factual issues identified by wife in support of her request for sole custody was that husband had "unilaterally enrolled [daughter] in a Sunday school class... to which he takes her every other Sunday, during his visitation period." In addition, she complained that a year earlier husband had taken the daughter to a therapist who was unsympathetic to her claim that

June 15, 1992, petitioner appeared for the hearing on the motions brought by each party. Although he was not represented by counsel he had witnesses in court and more on call. The matter was assigned to a trial judge who had had no previous involvement in the case.

The trial judge first stated that he would hear no testimony from witnesses[2]; he later stated that the parties could submit declarations within the next nine days, and then if the trial judge felt there was good cause to hear from witnesses he would convene such a hearing. Petitioner asked (in lay terms) if the court was requiring an offer of proof, and the trial judge responded in the negative, stating that affidavits from third party witnesses would be required, in all likelihood were all that would be admitted, and that unless the trial judge saw something in those affidavits which he felt merited live testimony no further hearing would be held[3]. Petitioner protested and

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the daughter had been sexually molested by petitioner herein.

2. THE COURT: "I'm not going to have any long cause hearings in this matter. Anything that's going to be decided, it's going to be a motion and a declaration." (June 15, 1992 Transcript at 2)

3. MR. BEGIER: "So that I get it clear, Your Honor, you want like an outline of what I would bring forward and what they would say?"

THE COURT: "I want something signed by them saying what they know, and I warn you that it is very likely to be the only thing that is going to be heard from that person." (June 15, 1992 Transcript at 25)

demanded a hearing with live testimony, to no avail. He later filed a number of documents, including affidavits from some, but not all of the witnesses identified at the hearing.

An attorney had been appointed by the court *sua sponte* several months earlier to represent appellant's daughter. At the June 15, 1992 hearing that attorney filed a lengthy, unsworn (and unsigned) "REPORT" consisting primarily of hearsay statements ascribed to third parties, the attorney's interpretation of comments made by a court-appointed psychologist, and her own opinions.

The trial judge, without holding a plenary hearing or allowing petitioner an opportunity to cross-examine the author of the "REPORT" or confront and cross-examine the purported sources of the hearsay statements ascribed to them in said document, issued an order on July 23, 1992 taking away appellant's right to joint custody of his daughter. No reason was given for the custody order. (See Appendix 1)

Appellant demanded a written statement of reasons for that order in a motion for reconsideration filed eight days later. That demand was ignored. In affirming the ruling of the trial court the state Court of Appeal cited comments made in the reports of the psychologist and court-appointed attorney for petitioner's daughter as evidentiary support for the trial court's decision.

The state Court of Appeal held that there is no right to a plenary hearing on child custody; that when the question is raised by a post-trial motion the trial court has the discretion to require the parties to proceed by affidavit in lieu of live testimony (eliminating, of course, any prospect of cross-examination.) The state Court of Appeals further held that the trial court had no duty to provide a statement of reasons for its decision. (That Court's reasons for this ruling changed after its initial opinion was issued, as discussed below, but the ruling did not.)

Stage of proceedings when federal question was raised.

1. Due process right to hearing at which adverse witnesses can be cross-examined and favorable testimony presented.

In petitioner's opening brief on appeal to the California Court of Appeal his initial counsel argued that "Judge Duncan refused to follow applicable law by refusing to provide the forum for cross-examination of any and all experts, see *Wheeler v. Wheeler* 34 Cal. App. 3d 239 [at 242] (1973)." The holding of that case is that a refusal to allow a parent the right to cross-examine the author of a report received in evidence, or to present witnesses in his own behalf, was a denial of due process of law. (Appellant's Opening Brief at 5)

In his closing brief he cited additional precedent for the proposition that: "Due process of law requires that

each party (a) receive a copy of the report (b) be given an opportunity to cross-examine the investigative officer and to subpoena and examine persons whose hearsay statements are contained in the report (c) be permitted to introduce evidence by way of rebuttal." (Appellant's Reply Brief at 6)

The state Court of Appeal held that when child custody was put in issue by means of a post-trial motion the trial judge had discretion to allow testimony or proceed exclusively by means of affidavits, citing state case authority addressing collateral post-judgment financial issues (motion to tax costs; charging order against a partnership interest to satisfy judgment against partner). The Court acknowledged that *Wheeler v. Wheeler, supra*, held that a due process violation had occurred under the facts of that case, but distinguished the precedent, apparently on the grounds that in *Wheeler* the appellant had made an offer of proof of the proposed testimony of his witnesses. (Court of Appeal opinion at 5, fn. 8 - but see *Wheeler, supra,* 34 Cal. App. 3d at 242)

Petitioner's present counsel filed a petition for rehearing in the state Court of Appeal arguing that: "Due process of law requires that when a parent is facing the loss of custody of his child, he be given an opportunity to cross examine witnesses against him and present witnesses in his own behalf, if he demands such a hearing." That petition addressed both California and Federal authority on the question of minimum due process of law in proceedings brought to terminate parental custody, noting that this

Court had addressed the minimum due process rights of parents faced with potential loss of custody of their children in *Santosky v. Kramer,* 445 U.S. 745 (1982) and *Stanley v. Illinois* 405 U.S. 645 (1972). (Petition for Rehearing in the Court of Appeal at 2)

In response to the petition for rehearing the Court of Appeal issued an Order Modifying Opinion and Denying Rehearing correcting various factual inaccuracies in the original Opinion. Petitioner's due process rights were not discussed in that document.

Petitioner petitioned the California Supreme Court for Review, presenting the issue as stated in this Petition: "Does the denial of a father's right to cross-examine witnesses and to present witnesses in his own behalf at a hearing which results in the loss of custody of his daughter violate the constitutional guarantee of due process of law?" - and argued that it did so. That Court denied review without comment.

2. Due process right to a statement of reasons for terminating a parent's right of custody of his child.

Petitioner asserts that the California statute governing orders terminating parental custody in divorce cases (former California Civil Code §4600.5 (i); later reenacted without substantive change as California Family Code §3087) is constitutional as drafted: "Any order for joint custody may be modified or terminated upon the petition of one or both parents or upon the court's own

motion if it is shown that the best interests of the child require modification or termination of the order. *The court shall state in its decision the reason for modification or termination of the joint custody order if either parent opposes the modification or termination order.*" (Emphasis added)

The constitutional violation lies in the California Court of Appeal's interpretation of the statute which renders its mandatory requirement of a statement of reasons illusory. he statute itself requires a statement of reasons but the trial court's failure to follow the requirements of the statute can only be enforced by the appellate courts and California's appellate courts decline to do so.

While petitioner's initial counsel correctly asserted that the above-quoted statute gave petitioner a right to a statement of reasons for the order issued, the state Court of Appeal initially analyzed the wrong subsection (subparagraph **(c)**) of the statute, and held that a statement of reasons was statutorily required only "upon the request of any party".

After the state Court of Appeal's error was noted in appellant's petition for rehearing that court acknowledged in its Order Modifying Opinion that California statutory law **does** require that a statement of reasons for terminating a parent's custody of his child is required in all cases, and that there was no **statutory** requirement for an express demand by the parent for a statement of reasons. However,

the state Court of Appeal then held that, notwithstanding the unambiguous language of the statute, a parent loses the right to such a statement of decision unless he affirmatively demands one in the trial court. While petitioner had in fact filed a request for reconsideration within eight days of his receipt of the order in which he stated "...in regard to... legal Custody"... "[Petitioner herein] SHOULD HAVE IN WRITING BY THE COURT THE LEGAL BASIS FOR CASE LAW [sic] THE BASIS FOR SUCH DRASTIC CHANGE" the state Court of Appeal held that the (apparently admitted) "procedural defect" could not be raised on appeal. Thus, the Court of Appeal refused to enforce the statutory mandate for a statement of reasons in a manner consistent with other appellate decisions from this State in like circumstances.

California appellate procedure provides no method at the intermediate appellate level for correcting misstatements of fact, or challenging legal assertions stated for the first time in an "Order Modifying Opinion" issued by the state Court of Appeal on the last day of its jurisdiction over a case, as was done here.

Petitioner raised the argument that the Court of Appeal's interpretation of the facially-constitutional statute was itself unconstitutional in his Petition for Review filed with the state Supreme Court: "Due Process of Law as Well as the Applicable Statute Require a Statement of Reasons for Stripping a Parent of the Right to Custody of His Child." (Heading of section B of petitioner's "Discussion of Legal Principles" section of his Petition for

Review in the California Supreme Court.) The petition for review was denied without comment.

Argument in favor of granting the writ.

1. Due Process Right to a plenary hearing before losing custody of one's child.

The loss of custody of one's child deserves to be treated with more dignity, respect and care than a post-judgment motion to tax costs. However, California law treats both questions as deserving of equal procedural protection, due to the fact that each question can be raised by a "motion". This procedural fact is held to be determinative of the process that is due to a parent faced with the loss of custody of his child. Hence, a parent in California who has already won custody of his child after a contested trial can be stripped of that most precious right by means of a summary procedure before a different judge in which he has no right to cross-examine adverse witnesses and no right to present witnesses in his own behalf. The local rules of the Alameda County Superior Court do not allow for direct examination "except in the Court's discretion in unusual circumstances or for proper rebuttal." (Alameda County Rules of Court Rule 11.0 (5) (e) - reproduced in appendix 5. See also San Francisco County Superior Court Rule of Court 11.I.1: "Generally, live testimony by a witness is not permitted.")

Petitioner asserts that the label of the proceeding by which his right to custody of his daughter is challenged - be it "motion", "petition", "order to show cause" or "complaint" - is irrelevant to the determination of what process is due him in the adjudication of that question.

What is determinative of the process that is due is the nature of the right threatened, the risk of an erroneous deprivation of that right through the procedures used, and the burden that the additional or substitute procedural requirement would entail on the government. Using that test California's distinction between custody rights taken away pursuant to "motion" and those deprived pursuant to proceedings triggered by other processes is simply irrational. Using traditional due process analysis it is clear that the minimum process appropriate to a hearing held to take away child custody rights is notice and a hearing at which the parent facing loss of custody has an opportunity to confront and cross-examine adverse witnesses and to present witnesses in his own behalf.

Thirty years ago summary legal and administrative procedures which adjudicated significant rights of citizens with meager procedural safeguards were not uncommon. Outside of the arena of standard criminal and civil trials there was a dearth of guidance as to what procedures were appropriate (what process was "due") prior to official action adverse to an individual's private interests. In recognition of the fact that important rights were threatened by those summary procedures this Court was called upon to judge the constitutionality of specific procedures on an *ad hoc* basis: e.g. *Armstrong v. Manzo*, 380 U.S. 545 (1965) - adoption of child without prior notice and hearing for natural parent violates due process; *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) - wage garnishment without prior notice or hearing violates due process; *Stanley v. Illinois*, 405 U.S. 645 (1970)

presumption that unwed father is unfit parent unconstitutional; parent entitled to hearing before children taken from him; *Morrissey v. Brewer*, 408 U.S. 471 (1972) - revocation of parole without notice and hearing at which parolee may testify, introduce documents and live testimony and right to confront and question adverse witnesses violates due process. But those cases failed to set forth a standard method of analyzing what degree of formal process was due in the myriad situations in which the various rights of private citizens were adjudicated.

In 1976 this Court stated the now-familiar due process analysis for determination of whether the procedure used in a given circumstance meets the requirements of the Fourteenth Amendment in *Mathews v. Eldridge*, 424 U.S. 319 at 335: "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Using that framework, this Court has determined that due process does not require the appointment of counsel for indigent parents in every parental status termination proceeding, but that the Fourteenth

Amendment did require that proof of lack of parental fitness in such a proceeding be by clear and convincing evidence, rather than a mere preponderance. (*Lassiter v. Department of Social Services*, 452 U.S. 18 (1981); *Santosky v. Kramer*, 455 U.S. 745 (1982)).

While the loss of legal custody in a family law proceeding is not as permanent or severe as the complete severance of parental ties at issue in *Lassiter* and *Santosky*, the rights threatened are nonetheless fundamental. (*Boddie v. Connecticut* 401 U.S. 371, 376 (1971).) It is worth noting that the one action complained of by wife in her motion to strip petitioner of his custody rights was that petitioner took his daughter to a Sunday school of his choice.

Here, all that petitioner requested was a plenary hearing at which he could present witnesses and confront and cross-examine the witnesses against him. The difference between the quality of information that can be conveyed (and misinterpreted) in writing and the clarity of information which can be adduced by means of live testimony and cross-examination is significant.

In support of the trial court's ruling herein the state Court of Appeal cited the recommendations made in the "REPORT" filed by the attorney appointed by the court on its own motion to represent petitioner's daughter as a factual basis for the trial court's ruling. (Appendix 2 at 7) That unsworn, unsigned report submitted by a court-appointed official who was unambiguously antagonistic to

petitioner herein, was not even provided to him prior to the June 15 hearing. Petitioner never had an opportunity to cross-examine the author of the report or any of the numerous individuals whose purported statements were included therein.

As noted in *Goldberg v. Kelly, supra*, 397 U.S. at 269, referring to hearings held to terminate assistance payments:

> "...[W]ritten submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. ... In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. E.g., *ICC v. Louisville & N. R. Co.*, 227 U.S. 88, 93-94 (1913); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103-104 (1963). What we said in *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959), is particularly pertinent here: 'Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to

show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross- examination. They have ancient roots. They find expression in the Sixth Amendment . . . . This Court has been zealous to protect these rights from erosion..."

In discussing appropriate procedure to utilize in social security overpayment recoupment cases, this court similarly noted the following in *Califano v. Yamasaki*, 442 U.S. 682 at 696-697 (1979):

"..."fault" depends on an evaluation of "all pertinent circumstances" including the recipient's "intelligence . . . and physical and mental condition" as well as his good faith. 20 CFR §404.507 (1978). We do not see how these can be evaluated absent personal contact between the recipient and the person who decides his case. Evaluating fault, like judging detrimental reliance, usually requires an assessment of the recipient's credibility, and written submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale."

Since determination of fitness of a parent to share in the legal custody of his child when that fitness is attacked

by an ex-spouse similarly involves assessing credibility of both parties as to relatively amorphous factors relevant to that issue the need for cross-examination, as well as the right to present testimonial evidence in one's own behalf, is a minimum procedural protection for the parent under attack. That determination rarely, if ever, will be based on the type of technical fact-finding for which no right of cross-examination need be provided. (e.g. *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

While the Court of Appeal cited some of the comments[4] made in the report of the court-appointed psychologist, Dr. Stahl, in its opinion as support for the trial court's ruling, that expert himself stated in his report that: "...in spite of my wordiness, I do not really believe that this letter can truly do justice to my real feelings in this matter" and recommended that the court **not** rely solely on his written report, but that he testify in court on the subject with counsel for the parties present to cross examine, specifically to allow a more thorough review of the issues relevant to the decision before the court. (This comment was made months prior to the June 15 hearing, at a time when no party anticipated the trial court's "no testimony" ruling.)

In the past California's appellate courts have repeatedly held that the minimum constitutional due

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4. But not all. In fact, Dr. Stahl **opposed** stripping petitioner of his custody rights.

process required for parents in court proceedings which are held to take away their custody of their children includes the right to cross-examine adverse witnesses and to present witnesses in the parent's own behalf upon the demand of the parent for such a hearing. (*Fewel v. Fewel,* 23 Cal. 2d 431, 433 (1943) , *Long v. Long,* 251 Cal. App. 2d 732, 736 (1967), *Wheeler v. Wheeler,* 34 Cal. App. 3d 239, 241-242 (1973)) These rights have been held to exist in all of the various different types of proceedings held to make such a determination: marital dissolution, juvenile dependency, etc. (e.g. *In re George G.* 68 Cal. App. 3d 146, 156-157 (1977), *McLaughlin v. Superior Court* 140 Cal. App. 3d 473, 480-481 (1983))

In 1943 Justice Traynor commented in his concurring opinion in *Fewel v. Fewel, supra*, 23 Cal. 2d at 438 that:

> "The fact that [California Code of Civil Procedure] section 2009 permits [the] use [of affidavits] 'upon a motion' does not mean that the issues in a contested case may be determined and a judgment rendered on the basis of written statements of parties not before the court and therefore not subject to cross examination. Where a motion is concerned not with an incidental procedural matter but with the fundamental substantive issues in controversy, and the order deciding it is in effect a judgment on the merits, the ordinary rules of evidence apply."

In 1996 the Court of Appeal in this case held that because the custody issue was determined after a hearing on a motion, California Code of Civil Procedure §2009 authorized the trial Court to elect to decide the matter on declarations and other documents filed before and at the hearing, citing *McLellan v. McLellan* 23 Cal. App. 3d 343, 349 (1972) (hearing on motion for costs) and *Eddy v. Temkin* 167 Cal. App. 3d 1115, 1121 (1985) (charging order against partnership for debt of partner).

Despite the string of due process rulings issued by this Court over the past three decades, it cannot be denied that in California courts the pendulum has swung back to the point where judges make significant decisions based upon whatever documents they chose to read in a file; and where no reason for those decisions need ever be given, effectively eliminating any ability to oversee that process. Petitioner requests that this Court grant certiorari to rule that the pendulum has swung too far in this state, and that citizens whose significant rights are affected by rulings of the courts of the State of California are entitled to enjoy the traditional, time honored, and beneficial procedures long held to be appropriate to the determination of matters as significant as child custody: the right to present witnesses to testify in ones behalf, and the right to confront and cross-examine adverse witnesses.

2. The right to a statement of reasons for terminating a father's right to joint custody of his daughter.

A statement of reasons for a decision adverse to an individual's fundamental rights has long been a recognized element of due process. (See, e.g. *Morrissey v. Brewer* (1972) 408 U.S. 471; *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970)) Here petitioner was denied the minimal courtesy of a statement of reasons as to why he was held to be unfit to have any right to share in the legal custody of his daughter.

Professor Tribe, in American Constitutional Law, (2d Ed., 1988) page 744, notes that: "Among the formal procedural safeguards ordinarily held to be require by due process, perhaps the most striking - *the right to be heard* and *the right to know why* - are ultimately more understandable as inherent in decent treatment than as optimally designed to prevent mistakes." Being stripped of custodial rights over one's child is a severe punishment - yet the reason for that court order is entirely unclear. Child custody issues are not like criminal trials, where the issues may be relatively simple: Did the accused do the specified act? Did he have the requisite intent? Nor is child custody like most civil litigation, which involve fairly clear questions of commission or omission of specific acts.

An order stripping a parent of custody is a wide-ranging condemnation of that parent. It may be based upon a finding of specific misconduct (such as wife's

baseless and ultimately unsuccessful molestation charge) or a more general impression of unfitness based upon vague feelings and various factors arising from individual instances which singly would not warrant such a drastic court action. A minimum right of that parent must necessarily include *the right to know why.*

While the California Legislature has duly enacted statutes requiring that judicial rulings in various different contexts must be accompanied by a statement of reasons, the California appellate courts have held just one to be self-executing: the statute which allows judges to assess sanctions against trial attorneys for litigation tactics undertaken in bad faith, California Code of Civil Procedure §128.5. (*Childs v. Painewebber Incorporated* 29 Cal. App. 4th 982, 997 (1994)) Failure to provide a statement of reasons for such an order (which will ordinarily impose a financial penalty of hundreds or few thousand dollars) results in *per se* remand to the trial court, where such a statement must be provided or the sanctions vacated. In areas of seemingly greater significance - child custody, criminal sentencing, etc., failure by California trial courts to honor statutes requiring statements of reasons for rulings has consistently either been held to have been "waived" or to be "harmless error".

In this instance, although the state statute is unambiguous regarding the requirement for a statement of reasons for the ruling, the California Court of Appeal held that the failure to provide such a statement cannot be raised on appeal unless the issue is raised by the adversely

affected party in some unspecified manner in the trial court - notwithstanding the fact that the failure of the trial court to provide such a statement of reasons will not be manifest until after the ruling is issued. Indeed, the very lack of a statutorily-mandated means of demanding a statement of decision allows the Court of Appeal to decide that the requirement was not met by whatever effort was made in the trial court to obtain one. Here, the appellate panel evidently felt that despite petitioner's prompt written demand that he receive "IN WRITING... THE BASIS FOR SUCH DRASTIC CHANGE" he was nonetheless barred from raising the issue of lack of a statement of reasons at the appellate level due to inadequate diligence in the trial court.

In this the appellate court was consistent with other California precedent antagonistic to enforcement of statutory requirements for the giving of reasons for rulings. (e.g. *People v. Sanchez*,23 Cal. App. 4th 1680 (1994), cert. den. - failure to provide statutorily mandated statement of reasons for imposing additional one year prison sentence "harmless error"; note dissent of Justice Kline at 23 Cal. App. 4th 1692 arguing that due process requires remand for statement of reasons.)

In addition to the dignitary interest of the affected parent in knowing why he has been punished, the requirement of a statement of reasons serves an important function in ensuring the proper functioning of the adjudicatory system. For all we know the trial court in this case may have made his ruling based upon a generalized

animus based upon race, sex or religion. A statement of reasons which revealed such an improper basis for the decision would allow for appellate review and correction of that error. As succinctly stated in *State v. Cooper*, 403 N.W. 2d 800, 802 (Iowa App. 1987): "To answer the abuse of discretion question, an appellate court needs to know why a trial acted the way it did, not why it might have done so." The speculation of the state Court of Appeal that the decision was based upon various matters it culled from the record is hardly a substitute for a simple statement of reasons from the judge making the actual ruling.

California appellate courts have instead elected to follow a "see no evil, hear no evil, speak no evil" policy of reviewing an entire trial court transcript for any evidence which would support a trial court decision on any grounds, presuming that those grounds were in fact those relied upon by the trial court, and then deferring to the discretion of the trial court to rule on those grounds, thus rendering the decision of a trial court judge who elects to flout a statutory requirement for a statement of decision virtually unreviewable and irreversible. Needless to say, that policy has resulted in a statewide judiciary with a marked reluctance to provide explanations for its rulings, lest those explanations provide a basis for reversal.

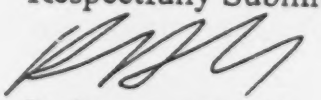
Conclusion.

Petitioner respectfully submits that the refusal of the California Superior Court to afford him the right to present witnesses in his own behalf, or to confront and cross-examine the witnesses against him in the proceeding in which he was stripped of his right to legal custody of his daughter, and the failure of the trial court to provide a statement of reasons for that ruling, and the refusal of the state Court of Appeal to enforce petitioner's statutory right to such a statement violated his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

Petitioner requests that this Court issue a writ of certiorari to the California Court of Appeal, First Appellate District, that the decision reached as a result of the hearing in the Alameda County Superior Court at which he was denied an opportunity to present and confront witnesses of be reversed, and that he be afforded a hearing on the issue of custody of his daughter at which he can confront and cross-examine the witnesses against him and present witnesses in his own behalf.

December 20, 1996

Respectfully Submitted



R. Stevens Condie
California State Bar 60855
11 Embarcadero West, Suite 140
Oakland, CA 94607-4543

APPENDIX 1

MINUTE ORDER DATED JULY 23, 1992
ALAMEDA COUNTY SUPERIOR COURT
THE HON. RODERIC DUNCAN, PRESIDING

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

July 23, 1992 Hon. Roderic Duncan, Judge DEPT. 23

Nancy Regas, Deputy Clerk

PATRICIA M. BEGIER,
Plaintiff,
vs.

JAMES A. BEGIER,
Defendant.

NATURE OF PROCEEDING: MINUTE ORDER
ACTION No. H 149686-0

The matter is placed on calendar this date by order from the Court. The matter having been submitted on June 24, 1992, the Court now renders its minute order.

The Court has reviewed the various motions submitted in this case, all declarations submitted by each of the parties and argument made at the hearing June 15, 1992. Those motions are decided as follows:

1. Sole legal and physical custody of the minor child is ordered for the Petitioner subject to visitation supervised by Stacey Rodriguez or Kandy Fontaine on the existing schedule (alternate weekends, 9 a.m. to 5 p.m. on Saturday and Sunday). Respondent is to continue to pay for the cost of supervision.

2. As a condition or her maintaining sole custody, Petitioner is to commence, regular therapy within 15 days with a mental health professional approved by the Court. (The Court anticipates accepting a therapist approved by

Trish Kaplan of Family Court Services). Petitioner is to bear the expense of this therapy.

3. The Court finds that Respondent's behavior in this litigation (see, for instance, the Intended Statement of Decision by Judge Ronald M. Sabraw filed September 6, 1991) and in his relationship with the attorneys for Petitioner and his child provides a need for his psychological evaluation in order to determine (1) the frequency of visitation, (2) the necessity for supervision, (3) the efficacy of conflict resolution counseling [sic] for the parties per Civil Code section 4608.1 and (4) the advisability of changing Jennifer's therapist (as recommended by Dr. Stahl) to lessen the conflict herein. The evaluator should recommend whether therapy and/or parenting training is indicated, make a recommendation of frequency and duration of any therapy and nominate several possible therapists. The report should be made to the Court by the evaluator, with a copy only to Respondent. Respondent may select from Ricardo Hofer, Ph.D., Michael Baar, Ph.D., Robert Schreiber, M.D. and Erica Meyers, Ph.D. to make the evaluation. He shall bear all costs in connection with the evaluation and therapy and make arrangements to commence with evaluation within 15 days. He shall report his progress on this matter to Ms. Kaplan by August 10, 1992.

4. Jennifer is to continue in therapy with Enid Sanders, MFCC, Ph.D.. Petitioner is to pay one-third and Respondent two-thirds of the costs of said therapy within 15 days of being billed by Dr. Sanders. Said payments are to be considered child support and failure to make payments will be treated appropriately. On February 3, 1992, Judge Corrigan reserved the issue of retroactivity of these [sic] charges to August 1, 1991 and the Court now determines that Respondent pay to Petitioner forthwith

one-half of the charges of Dr. Sanders from that date to the present.

5. Respondent's motion to reconsider the previous denial of his motion to terminate Ms. Campbell's services as the attorney for the child is denied. Respondent is ordered to contact the attorneys in this case only at their office address and, except in true emergency situations, only in writing. He is ordered not to contact their homes or to be within 100 yards of their homes. These orders expire July , 1992 unless otherwise extended. Respondent has furnished the Court with the transcript of a surreptitious tape recording he has made of a conversation he had with Ms. Campbell. While the Court will not consider such inappropriate conduct in making any rulings in this case, Respondent should understand that he strains the Court's ability to ignore his conduct and to concentrate on the legal issues.

6. Reconsideration of Judge Corrigan's decision re support has been requested by both sides (Petitioner subsequently dropped her motion, but has requested that the matter submitted in support of it be considered now). Judge Corrigan did not reach the matter before she recused herself. Therefore, the Court will consider support beginning July 1, 1992 based on Judge Corrigan's findings and material submitted by each party before and after her ruling February 3, 1992. Child support per new Civil Code section 4721 is set at $1359, which includes a $256 contribution to child care and private school. A printout of the figures relied upon is attached together with the required findings. In determining spousal support, the Court finds that the budget submitted by Petitioner in the Income and Expense Statement filed June 8, 1992 is reasonable. Therefore, spousal support is set at $874 from July 1, 1992, payable by wage assignment.

7. Jennifer should attend Adventure Time Extended Day Care. Respondent is not to visit the school grounds except at times when he is specifically invited individually or as part of an occasion by the school staff. At times of group events, he is not to communicate with Petitioner and he is to remain at least 10 yards away from Petitioner at all times. He is not to telephone or make any other contact with school personnel except in the case of a genuine emergency.

8. Respondent's motion for reimbursements filed February 13, 1992 is denied. It appears that a judgment dividing the property of the parties has been entered. If either party has refused to turn over an item of property specifically awarded to the other in the judgment, the remedy is contempt. If there is separate property of either party not listed in the petition or response and not treated in the judgment, the family law court has no jurisdiction to make orders regarding it. Likewise, the family law court has no jurisdiction to consider Respondent's claim of damage to property that has been transferred to Respondent. If there is community property not divided in the judgment which either party now seeks to have divided post-judgment, the matter is referred to Dennis Rothhaar, attorney at law, 763-5611, to act as a referee per Civil Code section 639. The party seeking the division of this "after-discovered" party shall pay Mr. Rothhaar's retainer and the referee should make a recommendation regarding reallocation of his fees.

9. Respondent's motion to quash the writ of execution issued herein is denied as having no valid legal basis.

10. Respondent's request for attorney fees and costs is denied. His request for reconsideration of the award of attorney fees to Petitioner is denied. His request for sanctions per Civil Code section 4611 and otherwise is

denied. His request for injunctive relief against Petitioner and her attorney are denied.

11. Petitioner's request for additional attorney fees is granted. For the period from December 23, 1991 to January 22, 1992, Mr. Weiler is awarded $4,000. For the period from February 28, 1992 to May 22, 1992, Mr. Weiler is awarded the sum of $4,200. Said sums are payable forthwith.

Respective counsel so notified by a copy of this minute order mailed this date to the following addresses:

LEONARD D. WEILER, ESQ.
ATTORNEY AT LAW
2 Annabel Lane, Suite 200
San Ramon, CA 94583

JAMES A. BEGIER
1915 East 14th Street
San Leandro, CA 94577

SIMONE CAMPBELL, ESQ.
COMMUNITY LAW CENTER
405 - 14th Street, 5th Floor
Oakland, CA 94612

By *Nancy Regas*, Deputy Clerk

APPENDIX 2

INITIAL OPINION OF THE CALIFORNIA COURT OF APPEALS, FIRST APPELLATE DISTRICT

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of
JAMES A. BEGIER and
PATRICIA M. BEGIER

JAMES A. BEGIER,

Appellant,

v.

PATRICIA M. BEGIER,

Respondent.

A059598

(Alameda County
Super. Ct. No. H149686-0A)

In this dissolution action husband appeals from postjudgment orders which (1) changed legal custody of the couple's young daughter from joint custody to the sole custody of wife; (2) required husband to undergo a psychiatric evaluation; (3) provided for continuing therapy for the child; (4) modified the award of child support and spousal support; and (5) denied husband's request for sanctions.[5]

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[5] In his opening brief, husband also challenges the award of attorney's fees to wife, but that issue has been

PROCEDURAL HISTORY

Husband and wife separated on July 25, 1990, after a four-year marriage. They had one child, a daughter Jennifer born August 24, 1987. Wife petitioned for dissolution of the marriage, and as of July 19, 1991, judgment was entered dissolving the marriage and dividing the community property in accordance with a stipulated agreement. The remaining issues were reserved for trial.

The main dispute between the parties concerned custody of their child and concomitant visitation rights. In both the pretrial and posttrial periods the trial court was barraged with OSC's and ex parte applications from both sides on these and related subsidiary issues.[6]

Husband appeals from two postjudgment orders.[7] The first is an order filed on August 17, 1992, on various motions by

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settled by the parties and withdrawn.

[6] Although husband is represented by counsel on appeal, he appeared in most of the trial court proceedings in pro per. Wife was represented by counsel below and for presentation of her respondent's brief. However, she now stands in pro per.

[7] The clerk's transcript contains a notice of appeal dated June 30, 1992, taken from the "hearing" of March 16, 1992. At that hearing husband was apparently disruptive and he left the courtroom in the midst of the proceedings. The court proceeded with the issue of attorney's fees and ordered husband to pay $9,000 toward wife's fees. As the issue of attorney's fees has been withdrawn, we dismiss the appeal initiated by husband's notice of appeal dated June 30, 1992.

both parties. The second is an order filed on September 21, 1992, denying, for the most part, husband's motion for reconsideration. (The motion was granted in one small respect, reducing the child support award from $1,359 to $1,347). The underlying facts will be set forth in the discussion of each issue.

I. CHILD CUSTODY

Shortly after wife petitioned for dissolution of the marriage, the trial court issued an order granting temporary physical custody of Jennifer to wife with visitation rights by husband and awarding temporary support. About three months later, wife filed an OSC to modify child support. In her supporting declaration, wife stated that since the previous hearing information had come to light to suggest husband had molested Jennifer. On September 27, 1990, the parties had stipulation (in accordance with the recommendation of the child's therapist) to a cessation of husband's visitation pending a hearing on custody. (Hence, wife sought an increase in support as she was now fully responsible for Jennifer's care.) Husband in turn petitioned for reinstatement of visitation. He denied molesting his daughter and submitted the results of a lie detector test he had taken. After a hearing on April 29, 1991, the trial court ordered supervised visitation by husband.

Thereafter, on September 6, 1991, after an extensive hearing on custody, the trial court (Judge Sabraw) issued a document entitled "Intended Statement of Decision." In that document the court detailed the conflicting expert evidence which had been presented on the questions (1) whether Jennifer had actually been molested and (2) whether husband had been the molester. The court determined that it could not conclude whether Jennifer had been molested by husband. The court

continued joint legal custody, gave primary custody to wife, and granted visitation to husband under a schedule of deescalating supervision. However, three months later, at wife's request, husband's visits were ordered (by Judge Corrigan) to be at all times supervised. Husband moved for modification of custody and visitation.

On January 15, 1992, the trial court appointed counsel for Jennifer and continued the matters of custody and visitation.

On June 15, 1992, the matter was assigned to Judge Duncan,[8] who denied the requests of both parties for a long cause hearing. Instead the court gave the parties until June 24 to submit additional declarations and ruled that it would allow testimony if it determined from the declarations that witnesses needed to testify. The court's decision (which is the principal order being appealed here) awarded sole legal and physical custody of Jennifer to wife with supervised visitation by husband.

Husband first contends that the trial court erred in failing to state reasons for the change in custody. He relies upon former section 4600.5, subdivision (c), of the Civil Code, which at the time provided: "Whenever a request for joint custody is granted or denied, the court, *upon the request of any party*, shall state in its decision the reasons for granting or denying the request." (Italics added.)[9] Here, husband made no request for

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[8] On June 4, 1992, husband petitioned to disqualify Judge Corrigan. The motion was denied, but Judge Corrigan recused herself.

[9] Section 4600.5 of the Civil Code provided: "(a) There shall be a presumption, affecting the burden of proof,

a statement of reasons. Absent a request, the trial court is not required to provide a statement of reasons. (*In re Marriage of Buser* (1987) 190 Cal. App. 3d 639, 642.)

Next husband argues that he was denied his right to present and cross-examine witnesses on the issue of custody. We reject the argument. A full trial had already been held on the issue of custody—at which witnesses gave oral testimony—culminating in Judge Sabraw's decision of September 6, 1991. In the proceedings before Judge Duncan, the trial court was acting upon numerous motions filed by the parties, including a motion by husband for reconsideration of custody and visitation.[10]

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that joint custody is in the best interests of a minor child, subject to Section 4608, where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of a minor child of the marriage. [¶] (b) Upon the application of either parent, joint custody may be awarded in the discretion of the court in other cases, subject to Section 4608. For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate under this subdivision, the court may direct that an investigation be conducted pursuant to Section 4602. [¶] (c) Whenever a request for joint custody is granted or denied, the court, upon the request of any party, shall state in its decision the reasons for granting or denying the request. A statement that joint physical custody is, or is not, in the best interests of the child shall not be sufficient to meet the requirements of this subdivision." (As amended Stats. 1988, ch. 1550, §2, p. 5559; repealed effective January 1, 1994, and replaced without substantive change Fam. Code, §3082.)

[10] Although the motion to reconsider custody was initiated by husband, wife declared in her responsive

When, as here, the matter before the court is a motion, the trial court is statutorily authorized to proceed by way of affidavit in lieu of oral testimony. (Code Civ. Proc., §2009; see generally 6 Witkin, Cal. Procedure (3d ed. 1985) Proceedings Without Trial, §29, pp. 345-346.) Although a court has discretion to receive oral testimony, it may refuse to do so and may properly rule solely on the basis of affidavits. (*McLellan v. McLellan* (1972) 23 Cal. App. 3d 343, 349.) The question on appeal is whether the trial court abused its discretion in declining leave to produce oral testimony. (*Eddy v. Temkin* (1985) 167 Cal. App. 3d 1115, 1121.)

We find no abuse of discretion here. The trial court invited the parties to submit additional declarations and ruled that oral testimony would be allowed if the declarations revealed that testimony would be necessary. Husband submitted no declarations.[11] In the absence of any indication of conflicting

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declaration, "I believe that Jennifer's best interest lies in an award of sole legal custody to me." At the hearing before Judge Duncan, the court asked both parties to outline their pending motions, and wife's counsel reiterated that wife was seeking sole custody. She also requested orders pertaining to the selection of the child's preschool, payment of the child's therapy expenses, and additional attorney's fees. Husband requested sanctions for false allegations of molestation, termination of the child's therapy, reimbursement for items of property allegedly taken by wife, modification of child support, reconsideration of custody and visitation, and attorney's fees.

[11] The witnesses husband sought to present to the court included a physician and a police officer, apparently witnesses pertaining to the question whether the allegations

evidence, the trial court could properly decide that it was unnecessary to see and hear the witnesses and judge their credibility.[12]

In any event, husband has failed to show any prejudice resulting from the court's decision to proceed by way of declarations. Having declined to submit any declarations, he has failed to demonstrate how the presentation of oral testimony would have altered the outcome of the proceedings.

Husband's main complaint is that there was no adequate showing of changed circumstances to justify the change of custody. We cannot agree.

Husband is correct in his assertion that to justify a change in custody there must generally be a persuasive showing of changed circumstances affecting the child. (*In re Marriage of Carney* (1979) 24 Cal. 3d 725, 730-731; see also *Burchard v. Garay* (1986) 42 Cal. 3d 531, 535.) Although a change of legal custody may not be as disruptive as a change of physical custody, the change-of-circumstances rule applies equally when

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of child molestation were false.

[12] The case relied upon by husband, *Wheeler v. Wheeler* (1973) 34 Cal. App. 3d 239, is distinguishable. In that case, the husband made an offer of proof on the issue of modification of custody and asked to present five witnesses, including the court-appointed investigator. The trial court rejected the offer of proof and relied solely on the investigator's report. The appellate court held the trial court had violated section 263 of the Code of Civil Procedure (no Fam. Code, §3115), which expressly permits cross-examination of the investigator, and the husband had been denied due process of law.

the modification affects legal custody alone. (*In re Marriage of McLoren* (1988) 202 Cal. App. 3d 108, 112-113, 116.)

The decisions whether to modify custody lies within the discretion of the trial court, and in exercising its discretion the trial court must make its ruling based upon a determination of the best interests of the child. The trial court's decision will not be disturbed on appeal unless the record clearly shows an abuse of discretion. (*In re Marriage of McLoren, supra*, 202 Cal. App. 3d at pp. 111-112.)

In *McLoren, supra*, the appellate court found an abuse of discretion in the change of legal custody from sole custody of the father to joint legal custody of both parents (with physical custody to remain with the father). In that case the record contained numerous psychological evaluation reports on both parents and the children documenting the emotional difficulties suffered by the children resulting from the parents' inability to cooperate in decisionmaking affecting the children's welfare. Two therapists testified at the hearing that joint legal custody was unworkable due to the parents' inability to cooperate. (202 Cal. App. 3d at p. 111.)

In the present case we face the converse situation. The initial custody award granted joint legal custody.[13] Yet, as in *McLoren*, the parties proved themselves unable to agree on various issues regarding Jennifer's upbringing. The parties sought judicial resolution of their disputes over what day care center or preschool Jennifer should attend, what therapist(s) Jennifer should see and what church Jennifer should attend.

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13 "Joint legal custody" means that both parents share the right and responsibility to make decisions relating to the child's health, education, and welfare. (Fam. Code, §3003.)

The supplemental report by Dr. Stahl, the court-appointed evaluator, concluded that the hostilities between the parents were having an adverse impact upon Jennifer.

Moreover, following Judge Sabraw's order in September 1991, husband's visitation had been ordered to be supervised at all times. Dr. Stahl and Simone Campbell, Jennifer's separate counsel, recommended that visitation remain supervised for the time being.

We find no abuse of the trial court's discretion to determine that the best interests of Jennifer would be served by granting wife sole legal custody and, hence, sole parenting responsibility.

II. PARENT THERAPY

In her responsive declaration to husband's request for modification of visitation, wife requested that the court condition husband's continuing visitation with Jennifer upon his obtaining therapy with an approved therapist.[14] The report by Jennifer's independent counsel recommended that *both* parents undergo therapy.

The trial court's order required wife, as a condition for maintaining sole custody, to commence therapy at her own expense. In addition, the trial court ordered husband to undergo a psychiatric evaluation to determine the frequency of visitation; the necessity for supervision of husband's visits with Jennifer; the efficacy of conflict-resolution counseling for the

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[14] Husband provide evidence that he had been undergoing counseling sessions with Carol Marks since May 1991. Wife's request seems to have been a request that husband switch therapists.

parties; the advisability of changing Jennifer's therapist; and the need for therapy or parent training by husband.

The court explained its order as follows: "The court finds Respondent's behavior in this litigation (see, for instance, the Intended Statement of Decision by Judge Ronald M. Sabraw filed September 6, 1991) and in his relationship with the attorneys for Petitioner and his child provides a need for his psychological evaluation in order to determine (1) the frequency of visitation, (2) the necessity for supervision, (3) the efficacy of conflict resolution counseling [sic] for the parties per Civil Code §4608.1 and (4) the advisability of changing Jennifer's therapist (as recommended by Dr. Stahl) to lessen the conflict herein."

The portion of Judge Sabraw's decision referred to above provides as follows: "First, the conduct of the Respondent, Mr. Begier, in dealing with nearly all of the health care professionals in this case, has been reprehensible. With the exception of his own therapist, Mr. Kearns, and his own expert, Ms. Marks, he has harassed, annoyed and threatened every psychiatrist, psychologist and therapist in this case. His harassment has included shouting obscenities, writing nasty letters, accusing doctors of molesting his daughter, threatening lawsuits; in short, engaging in all manner of intimidating tactics. This court has issued several temporary res[t]raining orders protecting these professionals from further harassment by Mr. Begier. [¶] As a consequence of his conduct, Mr. Begier has made the Court's job of fact finder more difficult in sorting out the allegations against Mr. Begier. As described by Doctor Stahl, the court-appointed evaluator in this case, Mr. Begier continually 'shoots himself in the foot' by engaging in

his ill-advised campaign of harassment against the health care professionals in this case. Mr. Begier's conduct has clearly hurt his case."

In his opening brief, husband argues that the trial court had no authority to compel him to undergo psychotherapy. (See *In re Marriage of Matthews* (1980) 101 Cal. App. 3d 811, 817-818, but cf. *In re Chantal S.* (1996) 13 Cal. 4th 196.) In his closing brief, however, husband concedes wife's point that the trial court did not order husband to undergo treatment; the court ordered husband to undergo a psychiatric *evaluation* to assist the court in determining a number of issues, including visitation, continued therapy for Jennifer, and therapy for husband. The possibility of court-ordered therapy for husband was left open for future resolution; the trial court imposed no order compelling therapy.

The trial court has the authority to appoint an expert to assist in its determination of issues. (Evid. Code, §730.) That power extends to appointment of a psychiatric expert to assist in the determination of custody and visitation issues. (*In re Marriage of Kim* (1989) 208 Cal. App. 3d 364, 372.) Husband argues that the power of the trial court under Evidence Code section 730 does not apply once the contested issues have been resolved. But that argument ignores the obvious import of the trial court's order: visitation, continued therapy for Jennifer, and therapy for husband were left open for future orders.

Husband next contends that the psychological examination was unnecessary and would only be duplicative of previous psychological examinations husband had already undergone. It is true that psychological reports had previously been

submitted to the court.[15] But the decision to order further evaluation focusing on the particular issues identified by the court was within the discretion of the trial court (*In re Marriage of Kim, supra*, 208 Cal. App. 3d at p. 372), and we find no abuse of that discretion.

Finally, husband contends that "as a matter of consistency" the trial court should have followed the procedures for a medical examination set forth in Code of Civil Procedure section 2032. Yet husband's only complaint is that he had no advance notice that such an order was under consideration. This complaint is unfounded, as both wife and Jennifer's counsel requested an order compelling husband to undergo therapy.

III. CHILD THERAPY

In its pendente lite order, the trial court followed the recommendation of the Family Court Services representative and ordered both parties to obtain counseling and further ordered the parties to obtain counseling for the child. In various subsequent orders the court continued to order therapy provided for Jennifer.

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[15] In advance of the trial on custody (culminating in Judge Sabraw's order of September 6, 1991), husband was observed by Dr. Jane Mertens, a child psychiatrist; counseled and tested by Keith Kearns, a family counselor; evaluated by Dr. Philip Stahl, the court-appointed evaluator; and treated by Carol Marks, a psychotherapist. For the hearing before Judge Duncan, updated reports were submitted by Dr. Stahl, by Carol Marks, and by Enid Sanders (Jennifer's therapist). In addition, Judge Duncan received a report from Jennifer's separate counsel.

In its order of August 17, 1992 (the order appealed from), the court ordered that Jennifer "shall continue in therapy with Enid Sanders," and the court ordered husband to pay two-thirds of the cost as additional child support. Husband contends the trial court's order for therapy for Jennifer of an unlimited duration violates section 4608.1 of the Civil Code, which limited court-ordered therapy to six months.[16]

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[16] Section 4608.1 of the Civil Code provided in pertinent part as follows: "(a) In any proceeding under this part where custody of, or visitation with, a minor child is at issue, the court may require the parents of the child who are involved in the custody or visitation dispute, and the minor child to participate in outpatient counseling with a licensed mental health professional, or through other community programs and services that provide appropriate counseling, including, but not limited to, mental health or substance abuse services, for not more than six months if the court finds that the dispute between the parents or between a parent and the child poses a substantial danger to the best interests of the child and that the counseling is in the best interests of the minor child. The court shall fix the cost and shall order the entire cost of the services to be borne by the parties in the proportion as the court deems reasonable. The court, in its finding, shall set forth reasons why it has found the dispute poses a substantial danger to the best interests of the child and the counseling is in the best interest of the minor child, and that the financial burden created by the court order for counseling does not otherwise jeopardize a party's other financial obligations. The court shall not order the parties to return to court upon the completion of counseling. Either party may file a new order to show cause or motion after counseling has been completed, and the court may again order counseling consistent with * * * this section [¶] The

The contention is meritless. As wife correctly points out, section 4608.1 pertained to dispute-resolution counseling for the *parents*. (See *In re Sarah M.* (1991) 233 Cal. App. 3d 1486, 1504, disapproved on other grounds, *In re Chantal S., supra*, 13 Cal. 4th 196.) There is no statutory limitation on therapy for the child.

As already noted, Jennifer has been in therapy since the outset of this action. In January 1991 husband moved to change Jennifer's therapist, asserting that the therapist (Enid Sanders) was making matters worse by proceeding on the premise that Jennifer had been molested. Judge Corrigan denied the request. Husband renewed his motion in January 1992. That motion was among the several motions pending before Judge Duncan. Jennifer's separate counsel recommended to the court that Jennifer should remain in therapy with Enid Sanders. Thus, in context, the trial court's order that "Jennifer shall continue in therapy with Enid Sanders" was not an order compelling therapy for Jennifer; it was a denial of husband's motion to change Jennifer's therapist.[17]

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counseling shall be specifically designed to facilitate communication between the parties regarding their minor child's best interest, to reduce conflict regarding visitation or custody, and ti improve the quality of parenting skills of each parent." (As amended Stats. 1991, ch. 410, §4, p. 1875, repealed effective January 1, 1994, and replaced by Fam. Code, §3190.)

[17] In her brief wife argues that husband lacks standing to object to the therapy for Jennifer. Wife contends that so long as she, the custodial parent, acceded to the therapy the therapy was not "involuntary" and therefore was

Moreover, wife had moved for an order compelling husband to contribute to the therapy expenses for Jennifer. Thus, again, the trial court's order can be construed not as an order compelling therapy but an order resolving the inter-parental dispute over the child's therapy and awarding to wife the additional child support to cover two-thirds of the therapy expenses. We find no error.

IV. SUPPORT

On February 3, 1992, the trial court (Judge Corrigan) ordered spousal support of $811 and child support of $647 (plus childcare expenses). The court based the child support in part upon a "20% child visitation factor."

In its order of August 17, the trial court (Judge Duncan) reconsidered the support orders based upon Judge Corrigan's previous findings and subsequent materials. The court ordered spousal support of $874 and child support of $1,359.

A. Spousal Support

Husband first complains that after a four-year marriage he should not have been required to pay spousal support beyond the two-year pendente lite period. Next husband asserts that the amount of spousal support is excessive in light of the evidence he submitted that wife is employed full-time. We reject both arguments.

In determining the amount and duration of spousal support the trial court was required to evaluate the factors set out in Civil Code section 4801, subdivision (a) (now Fam. Code,

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unobjectionable. The flaw in this argument is that husband was ordered to pay two-thirds of the therapy expenses as additional child support. Thus husband is directly affected by the order and has standing to complain.

§4320). The factors applicable here include the earning capacity of each spouse; their respective needs; the obligations and assets of each; and the duration of the marriage. The trial court possesses broad discretion in balancing all of the applicable factors, and we may not substitute our judgment for the judgment of the trial court. (*In re Marriage of Baker* (1992) 3 Cal. App. 4th 491, 498.)

The determination of the financial condition of the parties was made by Judge Corrigan in her order of February 3, 1992. Judge Corrigan found that wife began work in March 1991 with Pacific Telephone and was earning $1,970 per month working on a part-time basis. Husband was earning $3,150 but had an earning capacity of $4,000 and had other income (rental, dividends, interest) of $1,422 per month.

In seeking modification, husband asserted that wife's income had increased as she had become employed full-time. In his motion for reconsideration of Judge Duncan's order, husband asserted that wife was earning over $2,400 per month. But wife's counsel explained at the hearing that in fact wife has been taking time off (without pay) to take Jennifer to her therapist. The trial court denied reconsideration. We find no abuse of discretion.

B. Child Support

In February 1992 Judge Corrigan awarded child support of $647. In calculating the amount of support, Judge Corrigan took into account that husband had visitation 20 percent of the time.

Judge Duncan reconsidered Judge Corrigan's award and ordered child support of $1,359 (modified to ($1,347) based upon a visitation factor of 5 percent. Husband objects to the

inconsistency in visitation factors, but we find no error in Judge Duncan's calculation. Husband's visitation schedule called for visits on alternate weekends from 9 a.m. to 5 p.m. each day or 16 hours every two weeks. This time constitutes 5 percent of the 336 hours contained in a two-week period.

V. SANCTIONS

As indicated above, Judge Sabraw was unable to determine from the conflicting expert evidence whether husband had molested Jennifer. Judge Sabraw concluded that wife failed to meet her burden of proving either that any molestation took place or that husband was the perpetrator.

Three months after that ruling, husband filed an OSC for modification of custody and visitation and further sought sanctions pursuant to Civil Code section 4611 (now Fam. Code, §3027). That statute provides for an award of sanctions against a party in a dissolution action who makes a false accusation of child abuse.[18]

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[18] Civil Code section 4611 provided at the time of these proceedings: "If a court determines that an accusation of child abuse or neglect made during a child custody proceeding under this title was false and the person making the accusation knew it to be false at the time the accusation was made, the court may impose reasonable money sanctions, not to exceed one thousand dollars ($1,000) and reasonable attorney's fees incurred in recovering the sanctions, against the person making the accusation. For the purpose of this section, 'person' includes a witness, a party or a party's attorney. [¶] Upon motion by any person requesting sanctions under this section, the court shall issue its order to show cause why the requested sanctions should not be imposed. The order to show cause shall be served

In the order of August 17, 1992, the trial court (Judge Duncan) denied husband's request for sanctions without comment. Husband challenges that ruling, but we find no error.

The statute permits, but does not compel an award of sanctions. The decision whether to award sanctions lies within the discretion of the trial court. (Cf. *Dolan v. Buena Engineers, Inc.* (1994) 24 Cal. App. 4th 1500, 1504-1505 [sanctions under Code Civ. Proc., §128.5].) There was no abuse of discretion here. The statute applies whenever the trial court finds the accusation was false and the party making the accusation knew it to be false. Judge Sabraw found the evidence of molestation inconclusive, and we must presume from Judge Duncan's summary denial of sanctions that Judge Duncan found that husband had failed to meet his burden of proving that the accusation was false or that wife knew the accusation was false. The record amply supports the trial court's decision to deny sanctions, and we will not disturb it on appeal.

The orders appealed from are affirmed.

Dossee, J.

We concur:
Strankman, P.J.
Stein, J.

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upon the person against whom the sanctions are sought and a hearing thereon shall be scheduled by the court to be conducted at least 15 days after the order is served. [¶] The remedy provided by this section is in addition to any other remedy provided by law." (Stats. 1990, ch. 297, §1, p. 1576; repealed effective January 1, 1994, and replaced by Fam. Code, §3027.)

APPENDIX 3

ORDER OF THE CALIFORNIA COURT OF APPEALS MODIFYING OPINION AND DENYING REHEARING

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of
JAMES A. BEGIER and
PATRICIA M. BEGIER

JAMES A. BEGIER,

Appellant,

v.

PATRICIA M. BEGIER,

Respondent.

A059598

(Alameda County
Super. Ct. No. H149686-0A)

ORDER MODIFYING OPINION AND DENYING REHEARING

THE COURT:

It is ordered that the opinion filed on June 19, 1996, is modified in the following particulars:

1. The paragraph beginning at the bottom of page 3 and continuing to the top of page 4 is modified to read as follows:

Husband first contends that the trial court erred in failing to state reasons for the change in custody. Subdivision (i) of former section 4600.5 of the Civil Code provided at the time: "Any order for joint custody may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is shown that the best interests of the child require modification or termination of the order. *The court shall state in its decision the reasons for modification or termination of the*

joint custody order if either parent opposes the modification or termination order." (As amended Stats. 1988, ch. 1550, §2, p. 5560; repealed effective January 1, 1994, and replaced without substantive change by Fam. Code, §3087. Italics added.) Here, husband made no request for a statement of reasons, nor did he object to the absence of one. Even on his motion for reconsideration, husband made no claim of error in the trial court's omission of a statement of reasons. Husband cannot raise the procedural defect for the first time on appeal. (See generally 9 Witkin, Cal. Procedure, Appeal, §311, p. 321.)

2. Footnote 5 on page 4 is deleted, requiring renumbering of all subsequent footnotes.

3. On page 5, line 3 of the second paragraph, the work "supporting" is inserted between "no" and "declaration" so that the sentence reads:

Husband submitted no supporting declarations.

4. Footnote 7 on page 5 is modified to read as follows:

Among the witnesses husband sought to present to the court were a physician and a police officer, apparently witnesses pertaining to the question whether the allegations of child molestation were false. Husband never presented their declarations. Husband also sought to present testimony by Stacey Rodriguez and Kandy Fontaine, the court-appointed visitation supervisors, and he did submit their written reports. However, those reports were relevant to the issue of husband's conduct during the supervised visitations, not whether wife should be given sole parenting responsibility. Husband also submitted his own statement, a long and rambling tirade directed at the court-appointed counsel for Jennifer, apparently in support of his request that counsel's services be terminated.

The petition for rehearing is denied. There is no change in the judgment.

Strankman, P.J.

APPENDIX 4

ORDER OF THE CALIFORNIA SUPREME COURT DENYING PETITIONER'S PETITION FOR REVIEW

First Appellate District, Division One, No. A059598
S055178

IN THE SUPREME COURT OF CALIFORNIA

In Re the Marriage of
JAMES A. AND PATRICIA M. BEGIER

JAMES A. BEGIER, Appellant

v.

PATRICIA M. BEGIER, Respondent

Appellant's petition for review DENIED.

[GEORGE]
Chief Justice

APPENDIX 5

ALAMEDA COUNTY SUPERIOR COURT
LOCAL RULES OF COURT RULE 11.0(5)

(5) Conduct of Hearings on Orders to Show Cause and Notice Motions; Filing Requirements and Contents of Pleadings.

(a) Prior to their matter being heard, the attorneys and the parties shall meet and confer in good faith to review the issues pending before the Court and to inspect documents and exchange information in order that issues may be resolved, facts may be agreed to by stipulation, and those issues remaining may be clearly delineated and presented to the Court at the time of hearing. In the Court's discretion, it may refuse to admit in evidence documents and information not exchanged prior to the hearing. When the hearing is called, the attorneys for the parties shall advise the Court what issues have been settled by agreement and what issues remain contested.

(b) All pleadings in Family Law matters shall be in the form prescribed by Rule 1225 of the California Rules of Court. The income and expense declaration shall be printed on yellow stock.

(c) The application for order and supporting declaration and such other declarations in support of the relief requested shall set forth in full all facts upon which the moving party relies in support of the relief requested. The Responsive Declaration to the Order to Show Cause or Notice of Motion and such other declarations in support of the party's response shall set forth in full all facts upon which the responding party relies. In the best interests of children in custody and visitation proceedings, matters of a sensitive or inflammatory nature shall be alleged generally.

(d) A fully-completed, current Income and Expense Declaration shall be filed by each party in all hearings involving requests for support, attorney fees or other financial relief. Each party shall bring to the hearing copies of wage stubs or other documents reflecting evidence of income for the preceding three months and a copy of the party's most recent State and Federal income tax returns,

whether individual or joint. If a party is receiving public assistance, that fact shall be disclosed in the Declaration, and the District Attorney of the applicable county shall be notified at least fifteen (15) days prior to the hearing unless such notice is shortened by the Court.

(e) Subject to legal objection and cross-examination where appropriate (See Reifler v. Superior Court (1974) 39 Cal.App.3d 479), all declarations shall be considered received in evidence at the hearing. Direct examination on factual matters will not be permitted except in the Court's discretion in unusual circumstances or for proper rebuttal. The Court may decide contested issues solely on the basis of the Application, the Response, supporting declarations and memoranda of points and authorities submitted by the parties.

(f) On a motion or Order to Show Cause to Modify a prior Order, the moving party shall furnish a copy of the prior Order with the moving papers. Said copy need not be filed by the Clerk.

(g) On an Order to Show Cause and Declaration for Contempt, the moving party shall furnish a copy of the Order allegedly violated. Said copy need not be filed by the Clerk.

(h) A request for continuance shall be made at the earliest possible time prior to the hearing. A request for continuance at the time of the hearing shall be looked upon with disfavor unless good cause is shown. Once a matter has been set for hearing, no more than two continuances shall be granted unless good cause is shown, and, in the absence of good cause, the matter shall be dropped from the calendar.

(i) If service is not timely effected, a new hearing date may be obtained from the calendar clerk, and an Order to Show Cause may be reissued with a new face sheet attached to the filed papers.

(j) Moving and responsive pleadings shall be filed directly with the calendar clerk in the department in which the matter is pending (and not in the Office of the Executive Officer/Clerk) in actions pending in the Northern and Southern Divisions. In actions pending in the Eastern Division said pleadings shall be filed with the calendar clerk in the Executive Officer/Clerk's Office adjacent to the courtroom. Additional pleadings by the moving party and responsive pleadings by the responding party shall be served and filed no less than five days prior to the hearing. The Court, in its discretion, may refuse to consider papers not filed in compliance with this rule.